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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1944

No. 1209

LOUIS BURALL,
Petitioner,

vs.

JAMES A. JOHNSTON, Warden, United States Penitentiary, Alcatraz, California,
Respondent.

PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit and BRIEF IN SUPPORT THEREOF.

WAYNE M. COLLINS,
Mills Tower, San Francisco 4, California,
Counsel for Petitioner.

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To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Louis Burall petitions that a writ of certiorari issue to review a judgment entered against him on December 12, 1944, by the United States Circuit Court of

Appeals for the Ninth Circuit, in a cause pending therein numbered and entitled, "No. 10,724, Louis Burall, Appellant, vs. James A. Johnston, Warden, United States Penitentiary, Alcatraz, California, Appellee." The said judgment affrms an order of the U. S. District Court for the Northern District of California, Southern Division, denying his petition for a writ of habeas corpus.

JURISDICTIONAL STATEMENT.

Under authority of 28 U. S. C. A., Sec. 454, the petitioner addressed and presented to United States Judge Michael J. Roche a petition for a writ of habeas corpus seeking his discharge from the custody of the respondent. The petition asserted his detention was unlawful for having arisen out of a judgment of conviction, sentence and commitment which were void because, during the course of the criminal prosecution in the District Court in which he was convicted of the crime of mail robbery, he had been deprived of the assistance of his counsel at his preliminary hearing before a U. S. Commissioner in violation of the 5th and 6th Amendments. The petition was entitled "To Michael J. Roche, one of the District Judges of the United States District Court, the Northern District of California", and contained the prayer "Your Honor should issue the writ of habeas corpus ad subjiciendum." It was addressed to and presented to him in his individual capacity as a judge in whom the personal power and jurisdiction to grant the writ is lodged

by 28 U. S. C. A., Sec. 452. It was neither addressed to, intended for nor presented to any Court or to any other judge, the petition narrating petitioner's reasons for making his selection of a particular judge, under Sec. 454, instead of any Court or other judge likewise authorized under Sec. 452 to entertain such applications.

Judge Roche took no judicial action of any kind upon the petition addressed to him in his capacity as such judge. Instead he caused the petition, which was not entitled in the District Court, to be filed with the clerk of that Court who treated it as an ordinary civil filing therein and applied to it a mandatory rotary rule of assignment of the cases of that court by which the Court's action thereon was to be taken by Judge St. Sure, another judge thereof. That Court, not the judge, but through Judge St. Sure, issued an order to show cause thereon. The issuance of such an order was an expression that he deemed the petition sufficient on its face as pointed out in *Holiday v. Johnston*, 312 U. S. 342, 350. Thereafter, however, he determined that the petition did not state facts warranting the award of the writ and ordered denied its issue. The applicant appealed from this order to the Ninth Circuit Court of Appeals, raising the questions, *inter alia*, of the jurisdiction of the District Court to make the order and of the adequacy of the petition. The Circuit Court affirmed the judgment of the District Court in its entirety.

The order of the District Court denying the petition for the writ was entered therein on December 15,

1943 (R. 22), and was accompanied by an opinion (R. 16-22) reported in 53 F. Supp. 136. The petitioner appealed from said order to the Ninth Circuit Court of Appeals *in forma pauperis* (R. 23-26) on February 16, 1944, the method being recognized as proper in *Paget v. McCauley,* 95 Fed. (2d) 839. The judgment of the Circuit Court affirming the order of the District Court was rendered and entered therein on December 12, 1944 (R. 34), its opinion (R. 31) being reported at 146 Fed. (2d) 230. No petition for rehearing was filed in the Circuit Court by the petitioner. A petition for hearing the cause en banc was filed therein on March 12, 1945, by Denman, C. J., but not having been filed timely was not passed upon because of an obvious want of jurisdiction and was withdrawn.

The Circuit Court of Appeals for the Ninth Circuit had jurisdiction to consider whether the District Court acquired jurisdiction to consider and determine the character of the petition for the writ of habeas corpus and to make an order denying it under authority of Judicial Code, Sec. 128(a) (first), 28 U. S. C. A., Sec. 225(a) (first) and 28 U. S. C. A., Sec. 463(a).

The right of the Supreme Court to assume jurisdiction to review the decision of the Circuit Court of Appeals by writ of certiorari is conferred by Judicial Code, Sec. 240(a), 28 U. S. C. A., Sec. 347(a). Under authority of 28 U. S. C. A., Sec. 350, the petitioner's right to file this petition for certiorari was extended to May 2, 1945, by an order of Mr. Justice Douglas entered herein on March 2, 1945.

QUESTIONS PRESENTED.

1. When a petition for the grant of a writ of habeas corpus is addressed and presented to a specific district judge may he refuse to take any judicial action whatever thereon and, despite the mandate of 28 U. S. C. A., Sec. 455, transfer it to a District Court where, by the application to it of an arbitrary rotative case assignment rule of Court convenience, it is assigned to a department of that Court for the first judicial action to be taken thereon and that Court thereby acquire and assume jurisdiction to grant or deny the writ?

2. Is a petition for a writ of habeas corpus sufficient in alleging an unlawful detention of the petitioner resulting from a judgment of conviction in a criminal prosecution during the course of which a U. S. Commissioner deprived him of his right to be represented by his counsel at his preliminary hearing?

ASSIGNMENT OF ERRORS AND REASONS RELIED ON FOR ALLOWANCE OF WRIT.

ERROR 1.

The Circuit Court of Appeals has decided an important question of federal law, arising under 28 U. S. C. A., § 455, which has not been but should be settled by this Court, in giving a negative answer to the question stated in its opinion in this case, as follows:

> "2. Whether it is mandatory that a petition of [for a writ of] habeas corpus addressed to a specific judge of the district court must be heard

and determined by that judge to the exclusion of any other judge of the same court."

The negative answer is given despite the provision of 28 U. S. C. A., § 455 providing that the District *judge* to whom the application for a writ of habeas corpus is made, as such judge, "shall forthwith" determine whether the petition states facts entitling the applicant to the issuance of the writ and if so "shall forthwith award" the writ to the applicant. Section 455, the construction and validity of which is involved herein, reads:

> "Allowance and direction. The court, *or* justice, *or* judge *to whom such application is made shall forthwith award* a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto. The writ shall be directed to the person in whose custody the party is detained."[1]

This claim of error concerns the jurisdiction and judicial functions of the judge in the "forthwith" awarding of the writ under § 455 which brings the allegedly wrongfully imprisoned person out of the custody of the respondent and into the custody of the judge or Court. It does not concern the subsequent more deliberative proceeding after the writ is awarded by the judge and after the Court, not the judge, has issued the writ (28 U. S. C. A., § 451) and the merits are determined by the Court as in *Ex parte Clarke*, 100 U.S. 399 and *In re Fitton*, 45 Fed. 471.

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[1]Emphasis supplied by petitioner.

ERROR 2.

This assignment of error assumes that a district judge to whom the petition is addressed may refuse to consider and decide the sufficiency of the petition but may file it in the District Court and transfer to it the jurisdiction to consider and adjudicate upon its allegations and order the award of or the denying of the award of the writ.

The Circuit Court of Appeals has decided an important question of federal law, arising under 28 U. S. C. A., § 455, which has not been but should be settled by this Court, in holding valid a mandatory rule of rotation of selection of one of the four district judges of the Northern District of California for Court action upon the petition for a writ of habeas corpus which in the instant case did prevent and,[2] in an average of three-fourths of such petitions will prevent, the "forthwith" action of the Court required

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[2]The petition is dated Sept. 16, 1943. (R. 9.) Its accompanying affidavit is dated Sept. 17th. (R. 3.) The record does not disclose the date it was received by Judge Roche. It was filed in the District Court on Oct. 1, 1943. (R. 13.) On Oct. 14th that Court issued an order to show cause why the writ should not issue, returnable Oct. 20th, and directing service be made on the respondent and the U. S. Attorney. (R. 14.) On October 18th the respondent made a motion to dismiss the petition and the Court appointed counsel to represent the petitioning pauper prisoner in the proceeding. On Dec. 15, 1943, the Court entered an order (R. 22) dismissing the order to show cause and denying the petition for the writ. While the word "forthwith" in § 455 does not mean instanter it would not seem to authorize the unusual period of delay the petition encountered under treatment by Rule 1 of the Rules of Practice of that Court. What this Court said of like treatment of a petition for the writ in *Holiday v. Johnston*, infra, would seem appropriate here, viz., "It is said that the procedure tends to expedite the disposition of habeas corpus cases. The record in this case would seem to contradict the argument."

by 28 U. S. C. A., § 455, supra. The rule, the validity of which, only *as applied* herein, is involved herein, is Rule 1 of the Rules of Practice of that District Court, as follows:

> "Rule 1. All actions and proceedings of whatsoever kind or nature—including criminal, admiralty and bankruptcy—shall be assigned to the several Judges in regular rotation, by the Clerk. Such assignment shall be made immediately upon the filing of the first document, and shall be indicated by placing the initial of the Judge's surname after the case number. No change in any assignment shall be made except by Court order approved by the Judges affected."

There being three divisions in the Northern District of California in which a district judge may be sitting, one judge sitting at Eureka, California, over 300 miles from the Court in San Francisco in which one or two other judges may be sitting, with a fourth judge sitting in Sacramento, California, over 350 miles from Eureka and

under which mandatory rule a petition for the writ addressed to the Court in Eureka well may be required to be heard by the judge in Sacramento, 350 miles away, or one of the judges in San Francisco, 300 miles away, and

under which rule the petition cannot be considered "forthwith" by the Court in Eureka but must wait until the judge there has the case reassigned to him by Court order approved by the two judges so distantly situated, the San Francisco or Sacramento judge re-

quired to approve the order quite possibly being ill or temporarily absent from such cities.

ERROR 3.

The opinion of the District Court below is signed by the four district judges of that Court. In holding that a petitioned judge may refuse to act on a petition for a writ of habeas corpus as required by § 455, and transfer by rule of Court to some other judge the jurisdiction to order or deny the writ on the allegations of the petition, they state that petitioner's contrary contention is "notwithstanding the established practice of this Court, which has obtained for many years, and is convenient for the dispatch of its business." Likewise the opinion of the Circuit Court of Appeals states "Moreover, such a rule would make it difficult for the District Court to carry on its business in an expeditious and orderly way if numerous petitions were addressed to one judge of the Court. It has been the established practice of the District Court and has been found convenient for the dispatch of its business to assign all cases as they are filed in rotation to the different judges regardless of whether they are addressed to one judge or to the court."

The Circuit Court of Appeals, in affirming with approval such a justification on the ground of convenience or otherwise a district judge's so declining to act and so transferring the jurisdiction to act, "has decided a federal question in a way * * * in conflict with an applicable decision of the Supreme Court," namely, *Holiday v. Johnston*, 313 U. S. 342.

In the latter case the District Court for the Northern District of California was reversed for holding valid a rule of Court substituting for the district judge a commissioner to hear the testimony on the issue joined by the return to the writ of habeas corpus. This was despite the provision of § 761 of the Revised Statutes that "The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require."

There, as here, the district judge by a rule of Court sought to substitute another person to perform his judicial function. In reversing and holding that the district judge could not substitute the commissioner for himself because "it is a convenient practice" and "tends to expedite the disposition of such cases", the Court states (pp. 351, 352, 353).

> "We cannot sanction a departure from the plain mandate of the statute on any of the grounds advanced. We have recently emphasized the broad and liberal policy adopted by Congress respecting the office and use of the writ of habeas corpus in the interest of the protection of individual freedom to the end that the very truth and substance of the cause of a person's detention may be disclosed and justice be done. The Congress has seen fit to lodge in *the judge* the duty of investigation. * * * We cannot say that an appraisal of the truth of the prisoner's oral testimony by a master or commissioner is, in the light of the purpose and object of the proceeding, the equivalent of the *judge's own exercise* of the function of the trier of the facts.

"The circumstance that the practice has grown up of referring such causes to a commissioner, has long been indulged in in the federal courts of California, and has found *a place in a rule of court,* cannot overcome the plain command of the statute * * *

It may be that the practice is a convenient one, but, if so, that consideration is for Congress. *In view of the plain terms in which the Congressional policy is evidenced in the Habeas Corpus Act, the courts may not substitute another more convenient mode of trial* * * *

In summary, we hold that the provisions of the habeas corpus act, as embodied in the Revised Statutes, are too plain to be disregarded for any of the reasons advanced. *The District Judge should himself have heard the prisoner's testimony and, in the light of it and the other testimony, himself have found the facts and based his disposition of the cause upon his findings* * * *"

IMPORTANCE OF THIS CASE OF FIRST INSTANCE IN ANY APPELLATE COURT.

Until such recent refusals to act judicially on petitions for writs of habeas corpus by the district judges of the Northern District of California, in the hundreds of habeas corpus cases in the 155 years of federal adjudication none is cited by the Circuit Court, and your petitioner is unable to find any, in which a district judge has refused to consider and determine the validity of a petition for the writ and

to order the issuance of the writ if cause is stated in the petition.

Many likely situations may be conceived from the Circuit Court's justification of this "convenient" violation of § 455 of which the following is one. If the friend of a kidnaped man, being poisoned by his captors in a hideout in the forest near Eureka, California, filed in the District Court in Eureka a petition for a writ of habeas corpus, the rule would *require a delay of several days, maybe a week,* to forward the petition to the distantly assigned Sacramento or San Francisco judge, who may be out of town, obtain his order substituting the Eureka judge, file it in the Court, and notify the Eureka judge and obtain his consent. During that time the kidnaped man would die.

It is also conceivable that in such a situation the judge in Eureka would award the writ at once, *but in so doing he would violate the mandatory rule for action by a rotatively assigned judge, which rule the Circuit Court's decision here holds valid.*

In this connection it should be noted that the disturbance of the convenience of the District Court is the same as in *Holiday v. Johnston,* supra. It is the number of petitions from the federal penitentiary at Alcatraz in the jurisdiction of that Court.

The added judicial burden to any more often petitioned judge over that of the others, were it as onerous as the Circuit Court presumes it to be, is easily remedied. Rule 1 of the District Court may be amended to

provide that whenever a district judge notifies the clerk that a petition for the writ has been addressed to and received by him, it should take the place of the next case rotatively assigned to him under the present rule.

Instead of so amending their rule, the four district judges are attempting to repeal § 455 *and substitute something like the law as it was before that section was adopted.* (This is despite the necessary inference that Congress in enlarging in § 455 the power of the justices and judges which they "*shall* forthwith" exercise, must have intended that they would not refuse to exercise it.) The four judges frankly say as much, for their opinion below approves of the previous opinion of that District Court in *Wright v. Johnston,* 49 F. Supp. 748, which states (p. 750):

> "* * * By the predecessor statute, R. S. § 752, originally derived from 1 Stat. 81, judges of the several federal courts were granted power individually to award writs of habeas corpus *only during vacation.* See State v. Sullivan, C. C., 50 F. 593.
>
> Justice required that the detained person should not be compelled to await a regular session of the court, which might be a long time distant and removed from the place of imprisonment. See Ex Parte Everts, 8 Fed. Cas. page 909, No. 4581."

As stated by the Supreme Court in *Holiday v. Johnston,* if these judges desire to return to this more "convenient" condition of the law giving to the dis-

trict judges the jurisdiction to consider such writs only in the short periods between the regular session of the Court "that consideration is for Congress."

In this connection it should be noted further that no one of the four district judges has sought relief either directly in the Congress by having a bill introduced there, or indirectly through the Circuit Council, annual Circuit Conference or the Conference of Senior Circuit Judges.

ERROR 4.

In holding that a deprival of petitioner's right to counsel at the preliminary hearing before the U. S. Commissioner did not void the trial proceedings the Circuit Court of Appeals has decided a substantial question of constitutional law which has not been but should be settled by this Court.[3] It so decided in reliance upon its own prior decision, *Garrison v. Johnston,* 104 Fed. (2d) 128, 130, wherein no such issue was involved or passed upon and which, in turn, was decided upon the strength of a statement of this Court, in *Goldsby v. U. S.,* 160 U. S. 70, 73, that the

[3]The record reveals the petition alleged the commissioner deprived the petitioner of counsel (R. 5, 8, 10) by refusing to allow him to obtain counsel (R. 7) and refusing to allow him a continuance for such purpose (R. 11, 12) and that thereupon the petitioner "demanded counsel to represent him" which was refused and that petitioner thereupon was compelled to plead. (R. 11.) He alleged therein (R. 10) that he was not allowed "to contact" his attorney, Mr. Bell. The Circuit Court's opinion (R. 31) seems to have viewed the demand as having been only one for the assignment of counsel without cost. The petition, however, merely recites that the petitioner (R. 10, 11, 12) was not then informed "that he was entitled to have counsel assigned to assist him without cost".

failure to hold a preliminary examination of an accused doesn't deprive him of his constitutional guaranty to be confronted by the witnesses, an issue patently different from that involved herein. The question herein involves the construction and validity of the Sixth Amendment guaranteeing the petitioner the "Assistance of Counsel for his defense" in a "criminal prosecution" and the right thereto as safeguarded by the due process of law guaranteed by the Fifth Amendment. In *Anderson v. Treat,* 172 U. S. 24, this Court acknowledged that a deprival of the assistance of counsel to an accused person at such a preliminary hearing presents a substantial federal question but did not decide whether such a deprival voided the trial proceedings because the record revealed the accused had waived such a hearing. The precise question involved herein does not appear to have been determined by any appellate tribunal except the Circuit Court in this instance of first impression.

PRAYER FOR THE ISSUANCE OF THE WRIT.

Wherefore, the petitioner prays that this Court issue its writ of certiorari directed to the United States Circuit Court of Appeals for the Ninth Circuit commanding said Court to certify and send to this Court on a day certain, to be designated therein, a full and complete transcript of the record and all proceedings in the cause numbered and entitled in said Court, "No. 10,724, Louis Burall, Appellant, vs. James A. Johnston, Warden, United States Peniten-

tiary, Alcatraz, California, Appellee", to the ends that said cause may be reviewed by this Court as provided by law, that said judgment of said Circuit Court of Appeals be reversed and that petitioner have such other and further relief in the premises as may be just.

Dated, San Francisco, California,
April 23, 1945.

WAYNE M. COLLINS,
Counsel for Petitioner.

CERTIFICATE OF COUNSEL.

The foregoing petition for writ of certiorari, together with the hereinafter contained supporting brief, is well founded in point of fact and law, is presented in good faith and is not interposed for delay.

Dated, San Francisco, California,
April 23, 1945.

WAYNE M. COLLINS,
Counsel for Petitioner.

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No.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE JURISDICTIONAL QUESTION.

There would not appear to be much merit in the Circuit Court's assumption that non-compliance with Rule 1 "would make it difficult" for a District Court to perform its functions "if numerous petitions were addressed to one judge of the court". Since June, 1934, approximately 275 petitions have been filed in

the District Court here by prisoners confined to Alcatraz. The yearly average of about 28 petitions means that each of the four district judges here passes upon 7 such petitions per year under Rule 1. Were each of these petitions to be addressed to a specific judge in lieu of the Court the mathematical law of averages, expressed in petitioners' choice, would bring 7 petitions before each per year although the names of the applicants in a given number of cases would be different from those which might have resulted had Rule 1 been applied to all the petitions. Were the 28 to be addressed and presented to one judge at one time it ought not to take in excess of 2 days for him to take the initial judicial action thereon required by 28 U. S. C. A., Sec. 455. It is not unusual for a judge of the District Court here to handle 28 matters on a single law and motion calendar at one sitting. A petition for the writ requires an expenditure of no more effort and time than does passage upon a demurrer.

However irksome it may be it is no great burden for a petitioned judge to read a petition and, if it be found hopelessly defective on its face, to deny the application or, if it presents only doubtful issues of law or fact, to issue a rule (order) to show cause why the writ should not issue thereon and test such issues as on demurrer, a practice recognized in *Ex parte Yarbrough,* 110 U. S. 651. If convinced the petition states grounds or might do so if its defects appear curable by additional pleadings he issues the writ, returnable at a specified time. The petitioner

may be bailed pending a final decision on the merits. Thereupon the respondent files a return form to the writ "certifying * * * the cause of the detention" (28 U. S. C. A., Sec. 457) and the petitioner a traverse (§ 460) thereto. The bailed petitioner thereafter appearing, or the respondent producing the body of the unbailed petitioner in Court, and the Court then having custody of his body pursuant to the command of the writ, the summary hearing on the merits under § 461 is had to determine whether the petitioner be discharged from unlawful restraint or be remanded to his jailor. The question whether the actual hearing on the merits may be transferred by a petitioned judge to the Court or to another judge after the writ has been issued presents a question not involved in this case.

The Circuit Court's panel opinion herein stresses the importance of the jurisdiction question yet does not cite any authorities or mention 28 U. S. C. A., Sec. 455, much less construe its mandate for summary judicial action of the judge addressed.

Instead it adopts a district judge's opinion in *Wright v. Johnston,* 49 F. Supp. 748, 749, and sustains the refusal of Judge Roche to act on the petition and his attempt to transfer his jurisdiction on the same ground of convenience condemned in *Holiday v. Johnston,* 313 U. S. 342. The District Court's opinion and the Circuit Court's casual opinion do not mention *Holiday v. Johnston,* much less attempt to distinguish it.

The adopted District Court opinion, while setting forth § 455, nowhere construes its terms. Instead it refers to § 452[4] giving the petitioner the choice of eight Supreme Court justices, seven Circuit judges, four District judges and the District Court. Of that section the adopted opinion says (p. 749):

> "It is true that under 28 U. S. C. A. § 452, the several Judges of this court are empowered to grant writs of habeas corpus. *It does not follow, however, that it is mandatory upon the judge, to whom a petition for writ of habeas corpus is addressed, to pass upon such petition;* * * *"

Obviously it does not follow from § 452 that it is mandatory on the addressed judge to act summarily or otherwise on the application to him as judge. But casually to say the same of the words of § 455, that the judge chosen of the nineteen "to whom such application is made shall forthwith grant the writ," if properly applied for, is no more than disposing of this admittedly important question by stating "It is not so."

The opinion of the Circuit Court, in adopting that in *Wright v. Johnston,* supra, holds that a petitioner to *a judge* for a writ of habeas corpus has no more right to choose his judge than an ordinary civil liti-

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[4] "§ 452. Power of judges; place of entering order of Circuit judge. The several justices [8] of the Supreme Court and the several judges of the Circuit Courts of Appeal [here 7] and of the District Courts [here 4], within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty * * *".

gant filing his complaint *in the Court.*[5] The obvious answer is that Congress in § 452, supra, has given such a petitioner in the Northern District of California the choice of nineteen justices and judges.

It is true that in the summary action of the district judge he has a *discretion* to issue an order to show cause why the writ should not issue and that such procedure satisfied the requirement of the word "forthwith," as held in *Walker v. Johnston,* 312 U. S. 275, 284. However, nothing in the reasoning of that case warrants the district judge to whom the petition is addressed to *refuse to take any judicial action at all.*

The adopted district court opinion in support of Judge Roche's refusal to act and the substituted rotative rule of the Court action instead of action by the addressed judge, states at page 750 that "The propriety of such action was recognized in *Ex parte Clarke,* 100 U. S. 399, 403, * * * See, also, *In re Fitton,* C. C., 45 F. 471."

In adopting these authorities the Circuit Court failed to note much less comment that in each of these

[5]An application for the writ addressed and presented to a Court, as distinguished from one addressed and presented to a single justice or judge, is to be construed as one signifying an intention upon the part of the applicant that it be considered by any justice or judge thereof to whom it may be assigned by the clerk of that Court pursuant to a rule of Court convenience, its practice or custom. There is no such election when it is addressed and presented to a personally selected justice or judge whose personal original jurisdiction, lodged by § 452, is invoked under § 454 and whose duty it is under § 455 to take immediate judicial action thereon. There is no authority lodged by Congress in a personally selected justice or judge to refuse jurisdiction or to shift or to delegate it, the mandate of § 455 requiring him to take action thereon himself.

cases a judge addressed *awarded the writ.* In *Ex parte Clarke* the petition was addressed to all "the Judges of the Supreme Court." One of them ordered the Supreme Court to issue the writ making it returnable to him. The prisoner was brought before him, taken from the jailor and admitted to bail. The justice then ordered the case heard by the Supreme Court, that is before all the judges to whom the petition was addressed. Thereafter came the more deliberative process of considering the merits. The question here is not whether this is proper procedure, after the writ is awarded by the judge and issued by the Court. What is here concerned is the initial action of the judge under § 455, by which the imprisoned man is taken out of the custody of the jailor or kidnaper and into the custody of the judge or Court.

Nothing in these two cases warrants a judge's refusal to take any action on the petition. On the contrary, the Supreme Court in *Ex parte Clarke* (p. 403) states of the judicial action *after* the justice awarded the writ and the jailor made his return and produced petitioner's body, "Of course, under our system, no justice will needlessly refer a case to the court when he can decide it satisfactorily to himself, and will not do so in any case in which injury will be thereby incurred by the petitioner. No injury can be complained of in this case, since the petitioner (after he was produced on the awarded writ) was allowed to go at large on reasonable bail."

Nevertheless, in reliance on this case, the Circuit Court's opinion says the addressed judge may refuse to act on the petition and instead file it in the Court,

in which it is not entitled, and have the petition acted upon by a different judge emerging from the hopper of the rotation rule!

The adopted District Court opinion cites cases in which Circuit judges have refused to act because of interference with their appellate functions. Whether or not the difference in functions warrants the refusal of a Circuit judge to act judicially on the writ has not been decided by the Supreme Court, but the reasoning in these cases affords no ground for the refusal to act by the District judge. All are based on the theory that the petitioned District judge must act on such a petition.[6]

To the statement of the three-judge panel's opinion that the judge to whom the petition is addressed may die and hence is entitled to ignore the command that he "*shall* forthwith award the writ," it seems apparent that if he be dead he cannot transfer the jurisdiction to another judge.

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[6]In *United States v. Hill*, 71 F. 2d 159 (CCA-3), the Court states "28 U.S.C.A. § 452 confers power upon the judges of the Circuit Court of Appeals to grant writs of habeas corpus. This does not mean, however, that a judge of the Circuit Court of Appeals is bound to entertain such application when it might have been made to a judge of the appropriate District Court. In the instant case there were no circumstances alleged which would make it necessary for a judge of the Circuit Court of Appeals to allow the writ, since the appellant might have applied to either of two District Judges within the Middle District of Pennsylvania, where the appellant is confined. Neither is there an allegation in the petition that an application had been made to either of these judges. A refusal by Judge Woolley to take jurisdiction did not deprive the appellant from making an application to a judge of that district * * *" See also, relying on *United States v. Hill*, *O'Brien v. Swope*, reported in 102 F. 2d 471 and *Sweetney v. Johnston*, reported in 121 F. 2d 445, through opinions of a Circuit judge acting singly.

The opinion of the three-judge panel, in further justification of a transfer of the jurisdiction from the addressed judge to another judge, states that "The application of this rule (Rule 1 of District Court, supra), could work no injustice on petitioners for the reason that any petitioner who is dissatisfied with the decision of the District Court has recourse to the right of appeal, which has never been denied him if made in good faith."

That is to say, *the right of appeal from a Court lacking jurisdiction confers that jurisdiction.* This obvious *non sequitur* further shows the casual consideration of this important question, here presented for the first time to any Appellate Court.

The opinion of the three-judge panel also states that it may not be "necessary" to decide whether the petitioned judge may refuse to act upon the petition and by the District Court Rule 1 transfer his jurisdiction to another judge or, as here, to a Court. It is obvious that the Circuit Court, *sua sponte,* was required to determine such a jurisdictional question, whether raised by the parties or not. Here the jurisdictional question was raised by the parties and in the Court's opinion, as in the question stated by the Circuit Court, supra.

II.

THE DENIAL OF COUNSEL QUESTION.

A U. S. Commissioner is an adjunct of the Court, possessing independent, though subordinate powers of his own. (*Grin v. Shine,* 187 U. S. 181, 187.) The

preliminary hearing before him is a judicial hearing and an integral and important part of the *criminal prosecution* mentioned in the Sixth Amendment. If he finds, upon examination of both sides, a want of probable cause justifying the complaint against an accused he is empowered to dismiss the prosecution that has been commenced. If he finds probable cause exists he is empowered to lend impetus to the prosecution. He is, in fact, an examining and committing magistrate whom the Congress has authorized the District Courts to appoint, the power of appointment being permissive and not mandatory. (28 U. S. C. A., Sec. 526.) Upon acceptance of office he performs the specific statutory judicial duties which the Courts must perform if he refuses to act.[7] The Courts may and, if a commissioner be not appointed or refuses to act, must perform the limited magisterial duties required of him as incidents to their regular judicial duties. Without congressional authorization the Courts would not be empowered to delegate any part of their judicial functions to commissioners, as held in *Holiday v. Johnston,* supra, and of necessity would perform those functions themselves.

The right to be represented by counsel would be of little significance if the denial thereof did not operate to deprive the Court wherein the cause was pending of jurisdiction to proceed whether the deprival was occasioned by a commissioner or a judge. It is of little importance whatever if it may be taken away

[7]These powers are set forth in: 28 U. S. C. A., Secs. 526, 529, 530, 758, 18 U. S. C. A., Secs. 591, 594, 596, 611, 614, 615, 627, and 8 U. S. C. A., Secs. 45, 49 and 50.

at one stage of a criminal prosecution and restored at another. It might as well be dispensed with entirely. If a district judge is precluded from depriving an accused of counsel during the progress of a criminal prosecution, a commissioner, acting at the preliminary hearing stage of the prosecution as a substitute for the judge, likewise is precluded from depriving an accused of his right to counsel.[8] The violation, being enjoined by the Constitution, is one of a jurisdictional nature causing the Court to lose jurisdiction to proceed until the defect is corrected. The right to representation is not a mere matter of grace or simple privilege—but a fundamental substantive right that extends to "every step in the proceedings". (*Johnson v. Zerbst,* 304 U. S. 458, 463, and *Powell v. Alabama,* 287 U. S. 45, 68, 69. Also com-

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[8]The criminal prosecution of the petitioner took place in Illinois. (R. 4.) Under 18 U. S. C. A., Sec. 591, a commissioner performs the magisterial duties of an examining or committing magistrate, the same powers being lodged in him as in a district judge, state judge or justice of the peace. The commissioner who is alleged in the petition for a writ of habeas corpus involved herein to have conducted petitioner's preliminary hearing, exercised the magisterial powers which a judge or justice of the peace in Illinois was authorized to exercise. See Illinois Criminal Code, Ch. 38, Secs. 687, 688, 697, 698, 703 and 706. There being no federal statute expressly requiring a commissioner to notify an accused of his right to counsel or authorizing him to deprive an accused of such representation the law of Illinois is automatically invoked and becomes applicable under 28 U. S. C. A., Sec. 725. It is significant that its Criminal Code, Ch. 38, Sec. 754, provides, "Every person charged with crime shall be allowed counsel, and when he shall state upon oath that he is unable to procure counsel, the Court shall assign him competent counsel, who shall conduct his defense. In all cases counsel shall have access to persons confined, and shall have the right to see and consult such persons in private." The 6th Amendment also appears to guarantee the right to counsel from the time an accused is charged with crime.

pare *Pierre v. Louisiana,* 306 U. S. 354.) If violated with impunity it would lose its organic character, ceasing to be a rule of substantive constitutional law and becoming converted into a mere rule of adjective law which might be ignored or be presumed to be waived. This Court has declared, however, that the Courts must "indulge every reasonable presumption against waiver" of fundamental constitutional rights. (*Aetna Insurance Co. v. Kennedy,* 301 U. S. 389, 393.) It has also declared that they "do not presume acquiescence in the loss of fundamental rights". (*Ohio Bell Telephone Co. v. Public Utilities Commission,* 301 U. S. 292, 297, and *Johnson v. Zerbst,* supra.) If a commissioner may deprive an accused of the services of counsel he can act as a Star Chamber, can exact confessions and declarations against the interest of an accused, by unlawful methods, and these could be used against the accused at the trial.

In *U. S. v. Bollman,* Fed. Cas. No. 14,622, which altered the earlier rule announced in *In re Bates* (1858, D.C.), Fed. Cas. No. 1099a, it was decided that an accused is entitled to the services of counsel at his preliminary hearing. (See, also, *Wood v. U. S.,* 128 Fed. (2d) 265, 271.) The great weight of authority in the several state jurisdictions is in accord. (See summaries and citations in 84 L. Ed. 390-396.) In *Avery v. Alabama,* 304 U. S. 444, this Court declared that the denial of "any representation of counsel at all" would invalidate the criminal prosecution. In *Anderson v. Treat,* 172 U. S. 24, the question whether a deprival of the right to counsel at a preliminary

hearing before the commissioner deprived the trial Court of jurisdiction over the cause and invalidated the proceedings from that point on was recognized as posing a substantial federal question but was not determined because the record disclosed the accused had waived that hearing. The precise question does not seem to have been passed upon by any appellate tribunal except the Circuit Court below in the unprecedented decision in the instant case.

The Sixth Amendment does not confine the right of an accused to be represented by counsel to the time of arraignment for plea before the Court and to the trial. It expressly guarantees the right in all criminal "prosecutions", a term seemingly embracing and intended to embrace every stage of the prosecution from the lodging of a complaint to the passage of sentence. The Court has jurisdiction over the cause and over the person of the accused from the moment a complaint is filed and the defendant is arrested and taken into custody. The right is not restricted to actual appearances by counsel in a courtroom but includes the accused's right to full representation and consultation at any and every moment, both within and outside the courtroom, from the time the complaint is lodged until sentence is passed and the prosecution is terminated. If the right includes such services at the preliminary hearing and also at times prior thereto during the progress of the criminal prosecution, as recognized in *Anderson v. Treat,* supra, it would seem that a deprivation of the right would deprive the Court of jurisdiction to proceed in the absence of

a deliberate waiver upon the part of the accused. The corrective method to restore to the Court the lost jurisdiction would be to vacate the proceeding and proceed anew with the prosecution from the point where the jurisdiction was lost. This may be accomplished by a direct attack upon the judgment by a motion to vacate instituted by the defendant or the Court, or by appeal or by collateral attack through the medium of an application for a writ of habeas corpus.

It is significant that cases in which a commissioner fails to inform an accused of his rights are rare—and cases wherein he denies an accused the right to be represented by counsel, as alleged in the petition presented to the district judge below, are even rarer. Rule 5b of the Federal Rules of Criminal Procedure which has been submitted by this Court to Congress for approval provides:

> "The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules."

When the proposed rules are enacted into law we believe that commissioners will be able to ascertain their duties concerning the right of representation with greater ease than heretofore when they were

compelled to examine not only the Constitution, federal statutes and decisions, but also state law and the common law for light upon the subject. When the new rules become effective commissioners will be able to offer no excuses for violations of the rights of accused persons to counsel.

If the alleged deprivation of the petitioner's right to counsel at his preliminary hearing by the commissioner were to be declared as having no effect upon the validity of the judgment of conviction the safeguards of the Sixth and Fifth Amendments would lose much of their significance and the right to counsel would be destined, in the future, to be more honored in the breach than in the observance.

For the foregoing reasons we believe that a writ of certiorari directed to the Ninth Circuit Court of Appeals should be granted.

Dated, San Francisco, California,
April 23, 1945.

Respectfully submitted,
WAYNE M. COLLINS,
Counsel for Petitioner.

INDEX

CITATIONS

645317—45

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1209

LOUIS BURALL, PETITIONER

v.

JAMES A. JOHNSTON, WARDEN, UNITED STATES PENITENTIARY, ALCATRAZ, CALIFORNIA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 31–33) is reported at 146 F. 2d 230, and the opinion of the district court (R. 16–21) at 53 F. Supp. 126.

JURISDICTION

The judgment of the circuit court of appeals was entered on December 12, 1944 (R. 34). On March 2, 1945, petitioner's time to file a petition for a writ of certiorari was extended by order of

Mr. Justice Douglas until May 2, 1945 (Pet. 4). The petition for a writ of certiorari was filed April 27, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether it is improper for a district judge to whom a petition for a writ of habeas corpus is addressed to direct that the petition be filed with the district court for assignment in regular course in accordance with the rule of the court.

2. Whether denial of assistance of counsel at petitioner's preliminary hearing before a United States Commissioner at which petitioner entered a plea of not guilty invalidated his subsequent conviction.

STATUTE INVOLVED

The habeas corpus statute provides in pertinent part as follows:

> R. S. § 752 (28 U. S. C. 452): The several justices of the Supreme Court and the several judges of the circuit courts of appeal and of the district courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty * * *.
>
> R. S. § 755 (28 U. S. C. 455): The court, or justice, or judge to whom such application is made shall forthwith award a writ of habeas corpus, unless it appears from

the petition itself that the party is not entitled thereto. The writ shall be directed to the person in whose custody the party is detained.

R. S. § 761 (28 U. S. C. 461): The court, or justice, or judge, shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require.

STATEMENT

In 1939, in the United States District Court for the Southern District of Illinois, petitioner, who was represented by counsel appointed by the court, was convicted after a jury trial under an indictment charging assault on a custodian of the mails and mail robbery, and was sentenced to imprisonment for 25 years. See *Burall* v. *Johnston,* 134 F. 2d 614 (C. C. A. 9), certiorari denied, 319 U. S. 768. In September 1943, he sent to District Judge Roche of the District Court for the Northern District of California a petition for a writ of habeas corpus in which he alleged that his conviction and sentence were void for the reason that he had been denied the right to assistance of counsel at a preliminary hearing before a United States Commissioner (R. 3–13). In his application petitioner stated that he did not desire Judge St. Sure or Judge Welsh to consider his petition "as they had previously denied his applications for writ of ha-

beas corpus" (R. 5; see also R. 6, 9, 18).[1] Judge Roche directed the clerk of the court to file the petition and it was assigned to Judge St. Sure in regular course pursuant to the rule of the district court (R. 16).[2] Judge St. Sure issued an order to show cause (R. 14) and appointed an attorney to represent petitioner (R. 15). He subsequently filed an opinion holding that he had authority to consider the petition for a writ of habeas corpus even though it had been addressed to Judge Roche, and that the petition was insufficient on its face (R. 16–21). Accordingly, he entered an order dismissing the order to show cause and denying the petition (R. 22). The other three judges of the district court signed Judge St. Sure's opinion, stating that they were in accord with the views there set forth (R. 21).

On appeal to the Circuit Court of Appeals for the Ninth Circuit, the order of the district court was affirmed (R. 34).

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[1] For a statement of these prior habeas corpus proceedings, see Memorandum for the Respondent, No. 987, October Term, 1942.

[2] Rule 1 of the Rules of the District Court for the Northern District of California provides:

"All actions and proceedings of whatsoever kind or nature—including criminal, admiralty and bankruptcy—shall be assigned to the several Judges in regular rotation by the Clerk. Such assignment shall be made immediately upon the filing of the first document, and shall be indicated by placing the initial letter of the Judge's surname after the case number. No change in any assignment shall be made except by Court order approved by the Judges affected." (See R. 32–33.)

ARGUMENT

Petitioner contends (Pet. 5–14, 17–24) that under 28 U. S. C. 455, providing that "The court, or justice, or judge" to whom a petition for a writ of habeas corpus "is made shall forthwith award a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto," the judge to whom a petition is addressed must decide in the first instance whether the writ shall issue, and that he is without power to refer the petition to the court for assignment in regular course pursuant to the rules of the court. As the opinion of the circuit court of appeals indicates (R. 32), this question has recently been raised in several cases in that court as the result of the opinion expressed by Circuit Judge Denman in *Rutkowski* v. *Johnston,* 52 F. Supp. 430, that a petition presented to a judge of a district court must be heard by that judge and cannot be assigned to another judge of the court. The question was recently before this Court in a slightly different form on the petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Ninth Circuit in *O'Keith* v. *Johnston,* 146 F. 2d 231, certiorari denied, April 9, 1945, No. 1005, this Term.

We think that the decision below is clearly correct in rejecting the construction urged by petitioner. As District Judge Goodman stated in his opinion in *Wright* v. *Johnston,* 49 F. Supp. 748, 749 (N. D. Cal.), which the court below approved

in the instant case as a "correct statement of the law" (R. 32), Section 455 was not intended to enable a petitioner to "select a judge whom he might consider more favorably disposed to his cause than other judges of the same court equally available." That section and the requirement of 28 U. S. C. 461 that "The court, or justice, or judge shall proceed in a summary way" to decide the issues, do not "deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it." *Ex parte Royall,* 117 U. S. 241, 251; *Ex parte Collins,* 154 Fed. 980, 982 (C. C. N. D. Cal.), affirmed *sub nom. Collins* v. *O'Neil,* 214 U. S. 113. The rule of the district court providing for the assignment of cases to the judges in regular rotation (see fn. 2, p. 4, *supra*) is clearly designed to insure orderly procedure and was promulgated pursuant to its general authority to make rules for the conduct of its business (28 U. S. C. 731) and the power specifically granted by Section 23 of the Judicial Code (28 U. S. C. 27) whereby the judges of district courts having more than one judge are authorized to "agree upon the division of business and assignment of cases for trial." It is to be noted, moreover, that under 28 U. S. C. 452 an application for a writ of habeas corpus may be made to a Justice of this Court or a judge of the circuit court of appeals, as well as to a judge of the district court. And it has been held, contrary to the contention petitioner makes here, that such an appli-

cation will not be considered by a judge of the appellate court when it could, with equal facility, be made to a district court or a district judge. *United States* v. *Hill,* 71 F. 2d 159 (C. C. A. 3); *Sweetney* v. *Johnston,* 121 F. 2d 445 (C. C. A. 9), certiorari denied, 314 U. S. 607.

2. On the merits, the petition for a writ of habeas corpus was properly denied as insufficient on its face. Assuming, as petitioner contends (Pet. 14–15, 24–30), that denial of assistance of counsel at a preliminary hearing is improper and may, under certain circumstances, constitute a violation of a defendant's constitutional rights (see *Wood* v. *United States,* 128 F. 2d 265 (App. D. C.)), such impropriety did not vitiate the jurisdiction of the convicting court to try petitioner on the indictment subsequently returned against him. Although petitioner alleged that upon his appearance before the commissioner he was denied a continuance for the purpose of enabling him to communicate with counsel and that he "then demanded counsel to represent him, but instead of counsel he was told to plead," he admitted that he pleaded not guilty before the commissioner (R. 10). He did not allege that he was without counsel at the time of his trial, and the fact is, as revealed in his prior habeas corpus proceeding, that he was represented by appointed counsel at that time (see p. 3, *supra*). Under such circumstances the absence of counsel at the preliminary hearing did not prejudice petitioner and does

not invalidate his conviction. *Price* v. *Johnston*, 144 F. 2d 260 (C. C. A. 9), certiorari denied, December 18, 1944, No. 607, this Term;[3] *DeMaurez* v. *Swope*, 104 F. 2d 758, 759 (C. C. A. 9); cf. *Mumforde* v. *United States*, 130 F. 2d 411, 414 (App. D. C.), certiorari denied, 317 U. S. 656; *McJordan* v. *Huff*, 133 F. 2d 408 (App. D. C.).

CONCLUSION

The decision below is correct and the case presents no conflict of decisions or unsettled question of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

HUGH B. COX,
Acting Solicitor General.
TOM C. CLARK,
Assistant Attorney General.
ROBERT S. ERDAHL,
BEATRICE ROSENBERG,
Attorneys.

MAY 1945.

[3] See our Memorandum in Opposition in that case, pp. 9–10.

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